No. 439

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

HARRISON E. FRYBERGER,

Petitioner,

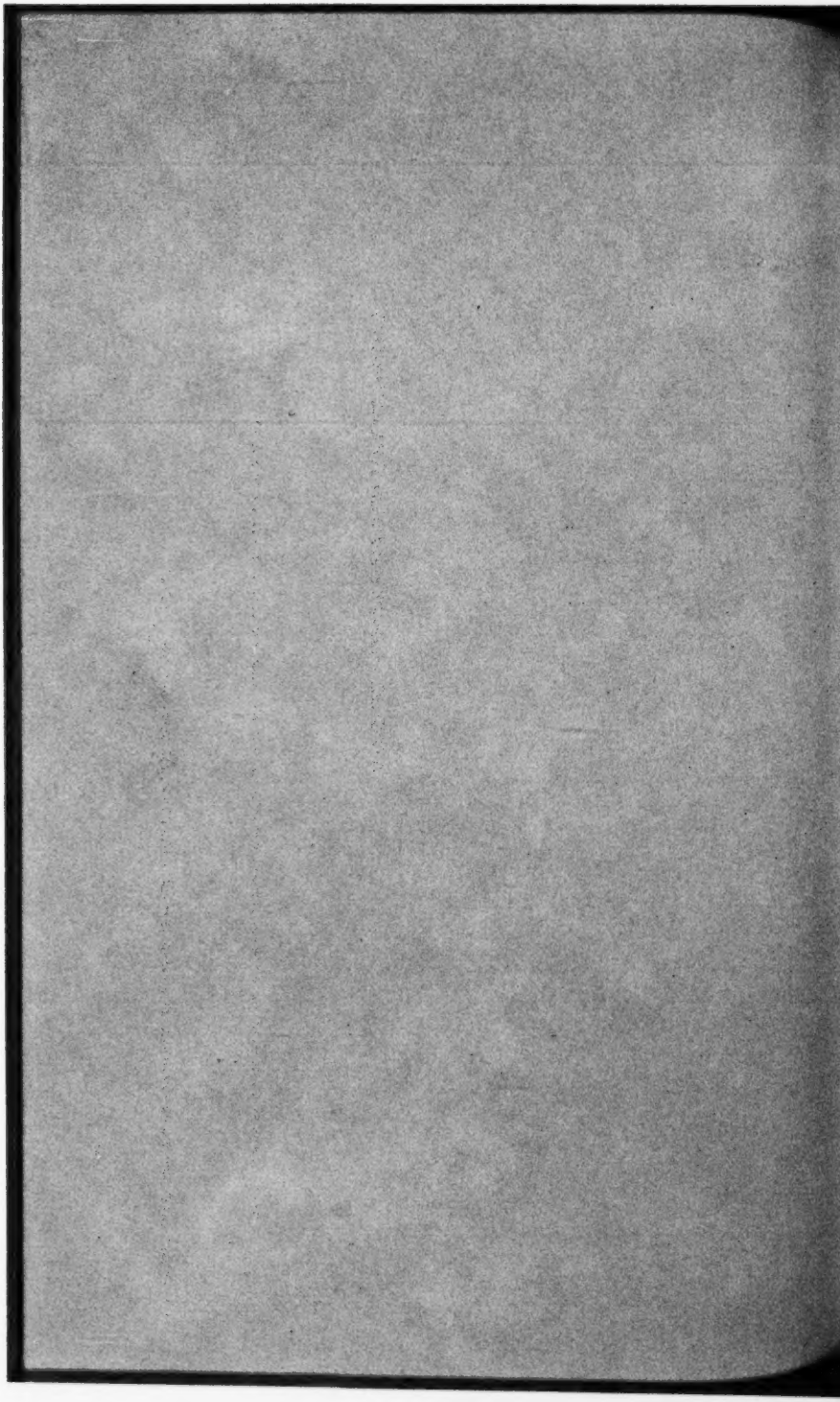
against

CONSOLIDATED ELECTRIC AND GAS COMPANY, a corporation, and CENTRAL PUBLIC UTILITY CORPORATION, a corporation,

Respondents.

PETITION FOR REHEARING

HARRISON E. FRYBERGER,
Petitioner.



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CASES CITED

MISCELLANEOUS

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Now comes the above named petitioner and for his petition for a rehearing in said cause, respectfully shows to the Court and alleges:

There are five grounds upon which petitioner seeks a rehearing:

I

Since the trial of said case in the Court below before Mr. Justice John E. McGeehan in June, 1941, there have been such drastic and far reaching changes in the facts and law governing this litigation that the New York State Courts have lost jurisdiction to enter the order of Justice McGeehan of January 14, 1942, his judgment of February 9, 1942, the judgment of the Appellate Division of January 21, 1943, the memorandum decision of July 20, 1943 and by reason of said changes, this Court has at no time acquired jurisdiction to enter its order of December 6, 1943.

On November 18, 1941 Consolidated filed with the Securities & Exchange Commission its petition in which it set forth that it desired to be placed under the control of the Commission; that the net assets of Consolidated at that time amounted to about $13,300,000 and that the object of the petition was to secure, in substance, the final dissolution of Consolidated Electric and Gas Company and that these proceedings were preliminary to the distribution of the entire assets of said Consolidated. That, in substance, Consolidated desired to transfer all its assets to the potential control of said Commission and to abandon the proceedings in the New York State Courts.

That heretofore, to wit, on January 28, 1942, petitioner in response to said petition, filed a petition for leave to intervene before said Commission and that thereafter the said Commission on February 20, 1942 under an entire misapprehension of the facts and the law used the following language in a memorandum opinion and order denying said application of petitioner for leave to intervene as a creditor until he secured the entry of judgment that he is a creditor:

> "A suit in the Supreme Court of the State of New York, seeking to establish this claim as a cause of action against Consolidated Electric and Gas Company and others, resulted in a decision in favor of the defendants, which decision was affirmed by both the Appellate Division and the Court of Appeals of the State of New York. A bill in equity in the Court of Chancery of Delaware was dismissed on the grounds that the matter was res judicata."

As shown by this language, the Commission was acting under a gross misapprehension. First, that the New York Court of Appeals had actually affirmed a decision of the New York Supreme Court when in reality the New York Court of Appeals had dismissed the appeal on the ground of want of jurisdiction and said Commission overlooked the fact that there was not a spark of evidence tending to support the contention of estoppel by judgment or estoppel

by verdict. What is more important yet, inasmuch as said cause of action in the so-called Harris Case in the New York Supreme Court was decided on the theory that the cause of action was one by petitioner for "rescission of contracts", that it must be dismissed because C. P. S. Corp. was an indispensable party and being omitted therefore the decision was not on the merits.

What is even more important, the Commission overlooked the fact that since the year 1925, there has been in full force and effect a New York Statute which defines a creditor and which is construed by the New York Court of Appeals as well as in the United States Supreme Court to mean that it is unnecessary that a judgment be entered; that in order to establish that a claimant is a creditor it is sufficient if he enters a claim or makes a demand as a creditor.

In truth and in fact, petitioner has actually been treated and regarded as a creditor by said Commission since February, 1942. That heretofore, to wit, on July 21, 1943, respondents filed with said Commission a notice of filing an amended Plan of Reorganization, etc. On November 13, 1943, the Commission filed an order postponing the hearing of all matters involved in said original plan and said amended plan and all of the matters dealing with the right of petitioner and all the so-called 50,000 claimants, to file petitions for leave to intervene concerning all the said matters including the rights of said 50,000 investors to intervene and their rights to share in the distribution of said assets and also their rights in case of the dissolution of Consolidated or in case it is held that Consolidated is a bankrupt, etc.

In said order of November 13, 1943, it is provided that a hearing on all these matters will be held by the Commission on February 15, 1944, and that petitioners who desired to intervene must file petitions for leave to intervene on or before February 10, 1944.

II

There is not a spark of evidence in the Record even tending to sustain the defense of res judicata set forth by respondents.

III

There is not a spark of evidence in the entire Record which even tends to support the judgment of Justice Lydon of October 14, 1935, or the judgment of the Appellate Division, First Department, of July 1, 1936, or the opinion of Chancellor Wolcott of May 25, 1938, or the order of Justice McGeehan of June 30, 1941, or his memorandum decision of January 14, 1942, or his judgment of February 12, 1942, or the judgment of the Appellate Division, First Department, of January 21, 1943, or the memorandum decision of the Court of Appeals of July 20, 1943, found in 291 N. Y. 556.

IV

For the reasons set forth in our petition for a writ, also in our reply brief as well as herein, the decisions and judgments of the New York State Courts which are complained of, are not simply voidable but absolutely void and subject to collateral attack. Therefore, this Court has no power to resuscitate them.

V

This Court will determine only matters actually in controversy essential to the decision of the particular cases before it. Where by an act of the parties, or a subsequent law, the existing controversy in the New York State Courts has come to an end, the case becomes moot and should be treated accordingly. The duty of this Court, as of every judicial tribunal, is limited to determining rights of persons or of property which are actually controverted in the particular case before it. This Court is not empowered to decide moot questions or abstract propositions or to declare principles or rules of law for the government of future cases.

SUBDIVISION I

Changes as to Real Parties in Interest

As already shown on November 18, 1941, Consolidated, by the filing of such petition, decided to abandon the proceedings involved in said New York State Court and since February, 1942, petitioner has been recognized by the Securities & Exchange Commission as a creditor and party in interest.

In the summer of 1942, petitioner was employed by some 10 of said 50,000 claimants holding claims against Consolidated aggregating over $70,000. The details of this litigation are found in the case of *Newell* v. *Consolidated*, serial number 17317-1942 of the files of the New York Supreme Court. Likewise, petitioner is informed by various associates of Mr. John W. Shaffer, residing in Minneapolis, Minnesota, that he, said Shaffer, has been engaged in the matter of organizing the said 50,000 claimants and that at this time he represents several hundred of the 50,000 claimants who actually hold valid claims against Consolidated aggregating in amount to more than $1,000,000; that said claimants, so represented, all reside outside of the State of New York and that said claimants represented by said Shaffer and his associates reside in a large number of the states of the Middle West and that the said claimants represented by petitioner, as well as said claimants represented by said Shaffer et al., propose to file petitions in intervention before the said Commission on or before February 10, 1944, and they all propose to participate in the hearing which has been set for February 15, 1944, by said Commission, at which hearing the Commission will consider and decide whether or not it is true that 85% of said 50,000 claimants surrendered their certificates of Class A stock to the C. P. S. Corp. and accepted stock in the C. P. U. Corp. under the representa-

tion that assets of the old C. P. S. Corp. of the actual value of over $49,000,000 had been set apart for distribution among said Class A stockholders of the C. P. S. Corp. As shown by the record referred to by our petition for a writ of certiorari and the reply brief, it has turned out by the evidence submitted before said Commission since November 18, 1941, that these assets retained by the C. P. S. Corp. instead of being worth $49,000,000 were actually not worth a penny. That such facts should in the nature of things have been decided differently by the Commission and that it is proposed by said Commission to have a plenary hearing on February 15, 1944, at which all parties in interest are required to appear and present their claims.

It is probably true that a criminal prosecution against C. P. S. Corp. by that name would be prevented by the Statute of Limitations, and it may be true that a criminal prosecution of Consolidated might be outlawed to quite an extent but not altogether.

In the meantime, all of said questions are *"in nubibus"*; they are mere moot questions, hypothetical questions, and this Court does not have even the slightest jurisdiction over either moot questions or hypothetical questions.

It now appears upon the undisputed evidence that in the year 1942 the gross income of Consolidated was over $36,000,000 and its net income was $1,871,000. The files of the Securities & Exchange Commission disclose that during the past 10 years over $5,000,000 has been paid to the Stone & Webster Service Corporation for managing the operations of Consolidated since the spring of 1933. In the light of these admitted facts, the statement found in the plan of reorganization of August 1, 1932, that Stone & Webster, Inc., is a wholly disinterested concern, is ridiculous. This is especially true because the scheme had already been cut and dried between Public Utility Holding Corporation, Stone & Webster, Inc., and others, to take possession of these assets, and as shown by R. Harris Case (fol. 3402), in the letter of Consolidated of

January 18, 1933, the gross earnings of Consolidated for the year ended September 30, 1932, amounted to $21,000,000. The evidence is conclusive that George E. Devendorf, who is the president and general manager of Consolidated, was also in control of its assets in 1932. Petitioner respectfully submits that it looks very strange on the face of things as to these 50,000 claimants who contributed nearly $79,000,000 of real money toward this C. P. S. Corp. enterprise; that their entire contribution should be turned over to Consolidated and that these persons engaged in a criminal conspiracy to defraud should be permitted to appropriate the entire assets to themselves, leaving nothing whatever for the 50,000 investors who reside outside of the State of New York.

That the New York State Courts have never had the slightest jurisdiction to pass upon the death sentence clause of the Public Utility Holding Act or the Public Utility Holding Statute or over the Securities & Exchange Commission Statute or upon its procedure or over its decisions. The Commission has actually the powers of a bankruptcy court and that if it be true that Consolidated is in truth and in fact utterly insolvent and bankrupt, that the New York State Courts have no jurisdiction whatever to decide what action shall be taken by the Commission. Furthermore, the above facts being true, this Court had no jurisdiction to make the order which it made on December 6, 1943, purporting to deny the petition of petitioner for a writ. Under a long line of decisions of this Court covering just such a case as this, it has been held by this Court that the only jurisdiction it had would be one of three courses of action:

a) To grant the petition of petitioner for a writ as applied for.

b) To set aside each and all of the judgments rendered in the New York State Court, since June, 1941.

c) To continue the proceedings in this Court until the Securities & Exchange Commission has completed its findings and decisions in the above matter. That is,

referring to the amended petition of Consolidated, a copy of which is herewith submitted and proceedings concerning which are to be brought on for hearing on February 15, 1944.

Moreover, since the adoption of our Constitution in 1789, it has been one of the cardinal principles of our Government that the doctrine of diversity of citizenship is applicable to the non-residents of any State in the Union—they cannot be compelled to submit their controversies to the State Court of any other State.

It should not be overlooked that the said petition of November 18, 1941, was actually offered in evidence before the New York Court of Appeals upon the argument of June 20, 1943. Not only that, but the substance of this petition was published in the New York Times of November 20, 1941, and every one of said New York State Courts has had actual notice and knowledge of the purport of said petition ever since that date. Moreover, the substance of the proposed amended Plan of Consolidated was published in the New York daily papers, shortly after July 21, 1943.

Ever since January, 1933, except as herein qualified, Consolidated has been stating not only orally but by sworn affidavits, that it has not done any business in the State of New York but that it has only been doing business in the State of New Jersey or incidentally in the State of Delaware. But heretofore, to wit, in the summer of 1942, petitioner secured evidence from the files of Consolidated and otherwise, that during said entire ten year period, Consolidated has been doing business in the State of New York uninterruptedly; that it has carried very large accounts during that time in the Chase National Bank in New York City and has been carrying a large bank account in Public National Bank in New York City; that it has several hundred employees at 90 Broad Street in New York City; that it has been using a large portion of said building for the purpose of carrying on all its business;

that its directors and officers have resided in the State of New York during said time and that it has been only during the past year that Consolidated now states in writing that its office is at 90 Broad Street, New York City.

If it be true, as it is true, that the New York State Courts have no jurisdiction to decide any controversy now pending before the said Commission in this litigation and that the Federal Supreme Court has no jurisdiction to deny our petition for a writ, just what are the big questions involved in this litigation? There are two:

> First: Is it practically feasible for the Commission to protect the rights of the 50,000 investors as against the rapacity of Consolidated and its attorneys and agents, and its various sponsors including the New York Stock Exchange?
>
> Second: If such an accomplishment is not feasible, will it be possible to prevent the American people from repealing the statute creating the Commission. In other words, we respectfully submit that the life and very existence of the Commission is involved in this litigation. In our view, the creation of the Commission was one of the real accomplishments of the Roosevelt Administration.

On November 30, 1943, petitioner wrote a letter to the Clerk of this Court in which he enclosed the said petition of November 18, 1941. Petitioner is informed that Mr. H. B. Willey, Clerk of this Court, duly presented this communication and petition to the Court on or about December 1st.

Law of the Case

In the case of *Kimball* v. *Kimball,* 174 U. S. 158, it is held that this Court is bound to consider any change in the facts occurring during the pendency of an appeal or since the judgment to be reviewed which affected its right and duty to proceed in the exercise of its appellate jurisdiction but

which did not appear in the record, to be proven by extrinsic evidence.

See also:

Simkins Federal Equity Practice, Section 963, p. 683.

In the case of *Watts* v. *Union,* 248 U. S. 9-21, it is held that this Court has the power not only to correct error in the judgment, but to make such disposition of the case as justice may require.

Citing:

Butler v. *Eaton,* 141 U. S. 240.
Gulf v. *Dennis,* 224 U. S. 505-506.

And in determining what justice now requires, the Court must consider the changes in fact and law which have supervened since the decree was entered below.

Citing:

United States v. *Hamburg,* 239 U. S. 466, 475, 478.

In the recent case of *Vandenbark* v. *Owens Ill.,* 311 U. S. 538-542, it is held that an appeal must be disposed of not as of the time judgment was entered (in the Court below) but as of the time the appeal is disposed of (this case was decided Jan. 6, 1941).

In the case of *Butler* v. *Eaton,* 141 U. S. 240 (where the Court reversed with instructions), the Court held that the necessary investigation to be made would involve the exercise of original jurisdiction, as to which it is not competent.

In the case of *Hoffman* v. *McClelland,* 264 U. S. 552, this Court recognized the doctrine of intervention "pro interesse suo" in a case where a tribunal has impounded the property.

See cases cited, p. 558.

In the case of *Keeley* v. *Ophir Hill,* 169 Fed. 605-606, an appeal in an equity suit was dismissed where the facts in controversy had been determined pending appeal in an action at law between the same parties.

In the case of *Gulf Railway* v. *Dennis,* 224 U. S. 508-509, it was held that a judgment in a state court below should be vacated so that the state court might apply the decision by awarding a new judgment.

We find a very interesting case decided by the Second Circuit Court of Appeals, namely, *Cover* v. *Schwartz,* 133 Fed. (2d) 541. This case was decided December 17, 1942, and it reviews a large number of authorities holding that the Federal Courts cannot constitutionally give advisory opinions since the Constitution confers jurisdiction on the Federal Courts only where there exists a real case or controversy and construing Article III, Section 2 of the United States Constitution. In *Cover* v. *Schwartz* just cited, it is held that a Court's awareness of its lack of jurisdiction need not come from the record of the case; it may come from appellant's brief or oral argument or otherwise.

The difference between a moot case and a real substantial controversy is set forth in the case of *Aetna Life* v. *Haworth,* 300 U. S. 227, 240. It is there held that an opinion advising what the law would be upon a hypothetical case would be moot.

See cases cited at p. 241.

In the case of *Radio Corp.* v. *General Electric,* 281 U. S. 464, it is held that the Federal Supreme Court cannot exercise or participate in the exercise of functions which are essentially legislative or administrative.

The parties to litigation cannot waive the question, the lower Court had no jurisdiction over the subject matter of the suit.

United States v. *Corrick,* 306 U. S. 583.

In the case of *Dakota County* v. *Glidden,* 113 U. S. 222, a case very much like the one at bar, it is held that the Federal Supreme Court will receive evidence outside of the record for the purpose of determining its action. In this case, it was cited that the death of one of the parties or the transfer of interest by assignment or by a judicial proceeding in another court as in bankruptcy or otherwise, is brought to the attention of the Court by evidence outside the original record and acted on.

At page 226 of the opinion of this Court, the correct practice is outlined in a situation such as we find in the instant case, namely, either this Court has the power to vacate the judgments and rulings of the lower Court since June 30, 1941 inclusive, or in its discretion, this Court may continue the proceedings in the instant case before it until there has been a complete hearing and decision by the Securities & Exchange Commission of the matters which are set for hearing for February 15, 1944.

Where an action is pending in both State and Federal Courts (or before a Federal tribunal) that Court which first takes possession or control actual or potential of the res, will exercise its power to completion and the other Court should stay proceedings before it pending the determination in the other tribunal.

See:

I. C. J. Sec. p. 1411, Section 133.

SUBDIVISIONS II, III AND IV

These three subdivisions may be considered together. They have been clearly and exhaustively considered and presented in our petition for a writ as well as in our reply brief. In the answering brief of respondents no denial is made as to the correctness of these charges contained in our petition for a writ.

A) While under the pleadings in the so-called Harris Case, a real controversy was raised yet in the proceedings before Justice Lydon, before the Appellate Division, First Department, on appeal, before the New York Court of Appeals in the so-called Harris Case, these proceedings were entirely moot and they did not present any real controversy and like all moot court proceedings the same were null and void and subject to collateral attack.

B) Likewise, the proceedings in the Delaware Court of Chancery, being based entirely upon the proceedings before Justice Lydon and in the Harris Case, are also moot and null and void and subject to collateral attack.

C) Likewise, inasmuch as in the suit tried before Mr. Justice McGeehan in June, 1941, the only defense urged was the defense of res judicata, it follows that this defense necessarily is "out the window".

D) Likewise, the proceedings before the Appellate Division, First Department, on appeal from the order and judgment of Justice McGeehan which ended in the so-called judgment of the Appellate Division of January 21, 1943, is necessarily null and void and subject to collateral attack and furnishes no support for the defense of res judicata.

E) Likewise, the order of the Appellate Division of February 11, 1943 and the order of the New York Court of Appeals of the date of April 22, 1943 denying the application of petitioner (plaintiff in the court below) for leave to appeal to the New York Court of Appeals, could not furnish any support for the defense of res judicata.

F) Likewise and for the same reason the memorandum decision of July 20, 1943 found in 291 N. Y. 556, furnishes no support for the defense of res judicata.

1) An analysis of this memorandum decision may be worth while. This memorandum decision shows on its face that it is a collection of self-serving declarations found chiefly in the false affidavit of Arthur M. Boal and in the brief of respondents.

At the bottom of p. 557, reference is made to the fact that plaintiff had offered no evidence in the trial before Justice McGeehan which had not been offered before Justice Lydon but as we show in our petition for a writ, this statement is false. Justice Lydon found in his so-called finding No. 16, R. this case, 307-309, that only 70% of the assets of the Central Public Service Corporation had been transferred to Consolidated and that as of the date August 1, 1932, 30% of the assets had been retained by Central Public Service Corporation but in the suit before Justice McGeehan it was alleged in the complaint (R. fol. 63) and it was established by Plaintiff's Exhibits 6, 7, 8, 9, 10, 11 and 12 (all described on p. 4 of our petition for a writ of certiorari), that the assets retained by Central Public Service Corporation, were in truth and in fact, not worth a penny but for reasons set forth on p. 4 of our petition for a writ, the assets retained were in one sense of the value of $28,000.

But there are several additional conclusive reasons why the so-called memorandum decision (found at 291 N. Y. 556) does not offer the slightest proof of res judicata. Some of these reasons are as follows:

In 1925 the State of New York adopted a Statute called Debtor and Creditor Law, in which the term creditor is defined as "a person having any claim whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent". And the substance of this law is set forth in paragraph 1 of the headnotes of the case of *American Surety Company* v. *Conner*, 251 N. Y. 1. The opinion in this case is written by Judge Cardozo. This headnote is as follows:

> "The ancient rule, whereby a judgment and a lien were essential preliminaries to equitable relief against a fraudulent conveyance, has been abrogated by article 10 of the Debtor and Creditor Law (Cons. Laws, ch. 12). Under the statute the creditor may reject the aid of equity and levy attachment or execution at law, or he may seek the aid of equity, and, without attachment

> or execution, establish his debt, whether matured or unmatured, and challenge the conveyance in the compass of a single suit."

And this Court in the case of *Shapiro* v. *Wilgus*, 287 U. S. 348 at p. 356, holds that under this New York Statute, it is unnecessary to reduce a claim to judgment and exhaust his remedy at law, although as a general rule, it is necessary to do so in the Federal Courts but even in the Federal Courts it would be unnecessary for plaintiff to reduce his claim to judgment. See *Case* v. *Beauregarde*, 101 U. S. 688 and *Wyman* v. *Wallace*, 201 U. S. 230-242. And the same doctrine is held in the case of *Cobb* v. *Interstate*, 20 Fed. (2d) 786. See paragraph 3 of the headnotes.

> "Where creditor's only remedy is in equity, as where he seeks to establish a liability which only equity will recognize, or to enforce an equitable lien or trust, it is not necessary that judgment be obtained and execution returned unsatisfied before suing."

Marcus v. *Kane*, 18 Fed. (2d) 722 (C. C. A.), holds that a claim "entered" or demanded is a claim by a creditor. And the authorities are uniform as to the precise moment a stockholder is converted from the status of a stockholder to the status of a creditor. It is stated in Benjamin on Sales, 7th Ed., p. 417, as follows:

> "It is not necessary that there should be a judgment of court in order to effect the avoidance of a contract when the deceived party repudiates it. The rescission is the legal consequence to reject it and takes date from the time he announces his election to the other party."

Black on Rescission, Second Ed., Section 623, holds the same and *Seneca* v. *Leach*, 241 N. Y. holds to the same doctrine.

In the instant case, there is no dispute in the record that the plaintiff in the Court below actually served and filed a notice of rescission in April, 1932. See our petition for writ of certiorari, pp. 4 and 5.

Both in the allegations of the complaint of plaintiff in the Harris Case, R. fols. 169, 194-195 and in the prayer for relief, there is not even the slightest dispute but that the suit of plaintiff in the Harris Case was one by plaintiff as a creditor.

The best evidence, the test as to what is shown in the record is the record itself. There is no dispute in the record on this issue.

In lines 16, 17 and 18, p. 557 of 291 N. Y. 556-557, the Court Reporter used the following language:

> "It being decreed that he (plaintiff) had failed to establish a right to a rescission of said purchase."

The ridiculous nature of this assertion is clearly seen when we bear in mind the New York Statute just referred to and the facts of this case as admitted in the record.

SUBDIVISION V

A justiciable controversy is defined by Chief Justice Marshall in the case of *Osborne* v. *U. S. Bank*, 9 Wheaton 738-819. That case was decided in the year 1824—120 years ago—and since that decision it has been held continuously by this Court that before this Court can exercise appellate jurisdiction there must be a real controversy between two parties. A moot case is insufficient to confer jurisdiction.

In the case of *California* v. *San Pablo*, 149 U. S. 308, the headnote is as follows:

> "If, pending a writ of error to reverse a judgment for the defendant in an action by a State to recover sums of money for taxes, the defendant offers to the plaintiff, and deposits in a bank to its credit, the amount of those sums, with penalties, interest and costs, which by a statute of the State have the same effect as actual payment and receipt of the money, the writ of error must be dismissed."

At page 314, the Court used the following language:

> "The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before it. When, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it. No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power, or affect the duty, of the court in this regard."

In the case of *U. S.* v. *Alaska*, 253 U. S. 113, paragraph 1 of the headnotes is as follows:

> "This court will determine only matters actually in controversy essential to the decision of the particular case before it."

At page 116, this Court uses the following language:

> "Where by an act of the parties, or a subsequent law, the existing controversy has come to an end, the case becomes moot and should be treated accordingly. However convenient it might be to have decided the question of the power of the Commission to require the carriers to comply with an order prescribing bills of lading, this court 'is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it.'"

In the case of *Dakota County* v. *Glidden*, 113 U. S. 222, this Court used the following language:

> In a case such as this, the Federal Supreme Court will receive evidence outside the record for the purpose of determining its action. In this case, it was

> cited that the death of one of the parties, or the transfer of interest by assignment or by a judicial proceeding in another court as in bankruptcy or otherwise, is brought to the attention of the court by evidence outside the original record and acted on.

From what has already been stated, it appears that the real controversy between the parties to this litigation so far as the New York State Courts are concerned, came to an end at least beginning with November 18, 1941. We respectfully submit that the act on the part of Consolidated of filing the petition with the Commission on that date was a confession by Consolidated that it had no possible defense to the New York suit tried before Mr. Justice McGeehan in June, 1941, and at least from that date the proceedings in the New York State Courts could only be regarded as the proceedings of a moot court.

Since that time, to wit, in July, 1943, Consolidated has asked leave of the Commission to file and has filed a proposed amended petition.

We respectfully submit that under all the authorities, all the decisions of this Court, this Court had no jurisdiction to file its order of December 6, 1943 purporting to affirm these moot court proceedings in the New York State Courts. But this does not signify that this Court does not have jurisdiction to render certain relief. This Court holds in *Dakota County* v. *Glidden,* 113 U. S. 222, that this Court has jurisdiction to send a case back to the State Court with instructions to vacate all the said proceedings which occurred in said State Court subsequent to November 18, 1941 and this includes the vacation of all said judgments hereinbefore described or it is possible that in its discretion this Court has the jurisdiction to stay all proceedings in this court until the Commission has made a full and complete decision as to all the matters involved in said petitions and as to the rights of all these claimants included in the 50,000 to file petitions and for their rights passed on by said Commission.

In the case of *Gulf Railway* v. *Dennis,* 224 U. S. 508-9, it was held that the judgment in the State Court below should be vacated so the State Court may apply the decision by awarding a new judgment.

In this case at pages 508-509, the Court used the following language:

> "We conclude that in the exercise of our appellate jurisdiction over the courts of the several States we are not absolutely confined to the consideration and decision of the Federal questions presented, but as a necessary incident of that jurisdiction are authorized to inquire whether by some intervening event those questions have ceased to be material to the right disposition of any particular case, and to dispose of it in the light of that event.
>
> The present case is not one in which the writ should be dismissed, because that would leave the judgment to be enforced as rendered, which the intervening decision shows ought not to be done. Instead of being an obstacle to granting any effectual relief to the plaintiff in error, that decision constitutes in itself an all-sufficient ground for relieving it from the attorney's fee, independently of the Federal question presented on the record; and for the reasons before stated we think it becomes our duty to vacate the judgment so that the state court may apply the decision by awarding a new judgment in conformity therewith."

Also we find that this decision has been cited by this Court with approval in a large number of recent decisions. See for example:

U. S. v. *Hamburg,* 239 U. S. 466, 475-478;
Duke Power v. *Greenwood,* 299 U. S. 259, 267-268;
Vanden Mark v. *Owens,* 311 U. S. 542.

And this same principle was recognized in the case of *U. S.* v. *Schooner Peggy,* 1 Cranch, 103-110, which was decided in 1801.

WHEREFORE, petitioner prays that this Court shall grant this petition and shall further grant:

1) Our petition for writ of certiorari as prayed for in our original petition.

2) That in any event, the Court shall vacate the judgment entered in the courts below since the trial of the case before Mr. Justice McGeehan in June, 1941.

3) That the Court in its discretion stay all proceedings in this case until there has been a complete adjudication of all the matters submitted to the Securities and Exchange Commission.

4) That this Court grant such other and further relief as to this Court may seem just.

HARRISON E. FRYBERGER,
Petitioner.

I DO HEREBY CERTIFY, that the above application is meritorious and presented in good faith, and is not undertaken for the purpose of delay.

HARRISON E. FRYBERGER,
Petitioner.